IN THE HIGH COURT OF DELHI

Crl.M.C. No.4802/03

K.S. Bakshi & Anr. ..... Petitioners
! through: Mr. Sidharth Luthra, Sr.Advocate with Mr.P.K.Dubey & Ms.Arundhati Katju, Advocates.

VERSUS

$ State & Anr. ..... Respondents
^ through: None.

RESERVED ON : 24.10.2007

% **D**ATE OF DECISION: 2.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. The issue which has arisen for consideration in the present petition under Section 482 of the Code of Criminal Procedure, 1973 is the scope and ambit of the expression "other liability" occurring in Section 138 of the N.I. Act.

2. Petitioners, directors of the company Ansal Buildwell Ltd., impleaded as accused Nos. 4 and 5 in a complaint filed by the respondent No.2 under Section 138 of the N.I. Act seek quashing of the complaint as also the summoning order dated

23.9.2002.

3. Facts in brief are that Ansal Buildwell Company is a company incorporated under the Companies Act, 1956. The company is engaged in the business of construction of the buildings.

4. Respondent No.2, i.e. Ms.Usha Uppal and one Mr.Rakesh Bedi were the owners of the property bearing No.4, Hailey Road, New Delhi, (hereinafter referred to as the said property).

5. On 10.6.1989, a MOU was entered into between the respondent No.2, Rakesh Bedi and Ansal Properties and Industries Ltd. (hereinafter referred to as confirming party). As per the said MOU the confirming party was to construct a group housing building on the said property. In pursuance of said MOU a sum of Rs.11.5 lacs was received by the owners from the confirming party. However, the aforesaid MOU was cancelled by mutual agreement between the parties to the MOU.

6. Thereafter, on 17.1.2001, a collaboration agreement was entered into between the respondent No.2, Rakesh Bedi, the confirming party and Ansal Buildwell Co. As per the agreement, the Ansal Buildwell Co. had to construct the multi-storeyed residential building on the said property.

7. Clause V of the aforesaid agreement around which controversy in the present petition revolves stipulated that as a

security for due performance of agreement, a sum of Rs.138 lacs was to be deposited by the Ansal Buildwell Co. with the respondent No.2 and other owner of the said property.

8. Clause V reads as under :-

"V. SECURITY DEPOSIT

(a) The Builder shall deposit with the Owners a total sum of Rs.138 lakhs towards security for due compliance of the terms of this Agreement by the Builder. A sum of Rs.11.5 lakhs has already been received by the Owners from the Confirming Party, receipt whereof the Owners hereby acknowledges. The Builder shall return the said sum of Rs.11.5 lakhs on behalf of the Owners, and the balance sum of Rs.126.5 lakhs shall be paid by the Builder to the Owners in 30 equal monthly instalments as per Annexure-II hereto.

(b) Payment of the said cheques on the due dates is the essence of the contract. In the event any cheque is dishonoured for any reason, the Builder shall replace the cheque with a demand draft within 7 days of the receipt of an intimation from the Owners failing which the Owners shall be entitled to take recourse to any right or remedy available to or accruing to the Owners by such dishonour.

(c) The said deposit shall not carry any interest and shall be refunded by the Owners to the Builder upon the Builder delivering to the Owners the possession of their areas in the Building.

(d) That upon failure of the Owners to refund the Security deposit the Builder shall have full authority and power to adjust the same by reduction of the allocation of the area of the Owners calculated on price prevalent and mutually acceptable as on the date of such default.

(e) That till the refund/adjustment of the entire security deposit in the manner stated above the Builder shall have a lien over 50% out of the Owners' areas in the Building and the owners shall

not sell/transfer/lease or deal with the same till the deposit is refunded to the Builder or recovered by the Builder by making adjustment out of the Owners' share. Delay in such refund will attract compound interest @ 18% per annum from the date the refund is due."

9. In accordance with the afore-noted clause, Ansal Buildwell Co. issued 30 cheques each in the sum of Rs.84,333/- in favour of respondent No.2.

10. Out of the said 30 cheques, 6 cheques bearing Nos.083683 to 083688 dated 1.12.2001, 1.1.2002, 1.2.2002, 1.3.2002, 1.4.2002 and 1.5.2002 respectively were presented for encashment by the respondent No.2. The said cheques were dishonoured and returned unpaid to respondent No.2 with a remark 'Exceeds Arrangements'.

11. Respondent No.2 issued a statutory notice dated 12.6.2002 as contemplated under Section 138 of the N.I. Act, 1881 calling upon the Ansal Buildwell Co. to pay the amount covered under the cheques within a period of 15 days and since the company failed to make the payment in spite of receipt of the notice the respondent No.2 filed a complaint against the said company as also its 5 directors including the petitioners under Section 138 of the N.I. Act.

12. On a prima facie consideration of the complaint and documents filed along with the complaint, the learned Metropolitan Magistrate summoned the accused persons to face trial for an offence under Section 138 of the N.I. Act.

13. During hearing of the instant petition, the learned counsel for the petitioners submitted that the sine qua non for an action under Section 138 of the N.I. Act is that the dishonoured cheque has been issued towards discharge of a "debt or other liability". That the expression "other liability" envisaged under Section 138 is akin to a debt or money owed. Learned counsel elaborated that the Section 118(a) and 139 of the N.I. Act raise a statutory presumption that the dishonoured cheque must have been drawn/made for a consideration, meaning thereby, that there must be some money due to the drawee from the drawer in lieu of which cheque was drawn. That the cheques in question cannot be taken to be issued in lieu of any money due to the complainant for the reason amount covered by the cheques was to be returned by the complainant to the accused company on the due performance of the agreement.

14. That the clause V of the agreement evidences that the cheques in question were issued as security for the due performance of the agreement. That from the fact that the amount covered by cheques in question was to be returned by the complainant/respondent No.2 to the accused company on the due performance of the agreement, it is clear that cheques in question were neither issued towards discharge of a debt nor because accused company owed any money to the complainant. Counsel further relied upon judgment of the

Supreme Court in the decision reported as *M/s. Narayana Menon Vs. State of Kerala* AIR 2006 SC 3366 in support of his contention that where a cheque is given only as a security, the provisions of Section 138 of the N.I. Act are not at all attracted.

15. Unfortunately, no assistance has been rendered to this Court by the complainant.

16. Relevant part of Section 138 of the N.I. Act reads as under :-

> **"138. Dishonour of cheque for insufficiency, etc., of funds in the account –** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from the account by an agreement made with the bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both :
>
> (a) * * * * * * * *
>
> (b) * * * * * * * *
>
> (c) * * * * * * * *
>
> *Explanation.*- For the purposes of this section, "debt or other liability" means a legally enforceable debt or liability.

17. At the outset, I note that the expression "other liability" cannot be construed as akin to the preceding word "debt". The

expression “other liability” can take its meaning and colour from the preceding word “debt” only if the rule of *ejusdem generis* is held to be applicable.

18. The rule of *ejusdem generis* is applicable when words pertaining to a class, category or genus are followed by general words. In such a case, the general words take their meaning from the preceding particular words because the legislature by using the particular words of a distinct genus has shown its intention to that effect. Thus, before the rule of *ejusdem generis* is applied it is a pre-requisite that there must be a distinct genus, which must comprise of more than one species. Consequently, if a general word follows only one particular word, that single particular word does not constitute a distinct genus and therefore rule of *ejusdem generis* cannot be applied in such a case.

19. In Section 138 of the N.I. Act, the general expression “other liability” follows only one single expression, i.e. “debt” which is not a distinct genus. In the absence of distinct genus the rule of *ejusdem generis* has no application and therefore the expression “other liability” cannot be interpreted in the light of the preceding word “debt”.

20. The Supreme Court had the occasion to consider the ambit of the expression “other liability” in the decision reported as *I.C.D.S. Ltd. Vs. Beemna Shabeer & Anr.* AIR 2002

SC 3014. In the said case, the issue under consideration was as to the maintainability of the proceeding under Section 138 of the N.I. Act vis-a-vis a guarantor. In para 10 and 11 of the said judgment, it was observed as under:-

> "10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the Section stands with the words "Where any cheque" The above noted three words are of excrement significance, in particular, by reason of the user of the word "any"--the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.
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> 11. The issue as regards the co-extensive liability of the guarantor and the principle debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the Statute depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act: 'Any cheque' and 'other liability' are the two key expressions which stands as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the Statute. Any contra interpretation would defeat the intent of

> the legislature. The High Court, it seems, got carried away by the issue of grantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus does not lend any assistance to the contentions raised by the respondents."

21. From the afore-noted observations of the Supreme Court in *I.C.D.S case* (supra), it is clear that the expression "other liability" must be given its ordinary and grammatical meaning.

22. Notwithstanding that Section 138 of the N.I. Act is a penal provision, phrases used therein must be considered in the same sense as people in the commercial world would understand the same.

23. Thus, if given its full meaning, the expression "other liability" within its broad sweep would include any "liability to pay".

24. Matter can be looked at from the point of view of contractual terms which are fundamental to a contract and terms which are not.

25. The doctrine of fundamental terms of a contract as enunciated in the decision reported as *Suisse Atlantique Societe D'Armement Maritime S.A. Vs. N.V. Rotterdamche Kolen Centrale* (1967) 1 AC 361 (Pg 422) is as under:-

> "A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law

> regards as a condition which goes to the root of the contract so that any breach of that term may at once and without reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus is conferred on him the alternative remedies at his option."

26. In the decision reported as *Lombard North Central PLC Vs. Butterworth* (1987) Q.B. 527 (Pg 535), it was observed as under :-

> "3. Certain categories of obligation, often called conditions, have the property that any breach of them is going to the root of the contract. Upon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach."
>
> 4. It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision."

27. Thus an obligation which is a condition, if breached, hits at the root of the contract and by contract it is open for the parties to make a term a condition which otherwise under ordinary circumstances it may not be.

28. In this regards, it is essential to note clause V(b) of the agreement which stipulates that the payment of cheques on due dates is the essence of the contract. It reads as under :-

> (b) Payment of the said cheques on the due dates is the essence of the contract. In the event any cheque is dishonoured for any reason, the Builder shall replace the cheque with a demand draft within 7 days of the receipt of an intimation from the Owners failing which the Owners shall be entitled to take recourse to any right or remedy available to or accruing to the Owners by such dishonour.

29. Under the agreement, the accused company had a

liability to pay Rs.138 lakhs to the complainant and other owner of the said property and discharge of this liability was treated fundamental to the agreement, non-performance thereof would entitle the complainant and the other owner to rescind the contract.

30. In the instant case, money in sum of Rs.126.5 lakhs was to be paid by the accused company to the complainant and other owner. It is irrelevant whether such money was to be retained and returned in future on due performance of the agreement. What is relevant for purposes of Section 138 of the NI Act is the fact that at the time of issuance of cheques the accused company had a liability to pay money to the complainant and other owner of the said property.

31. A distinction has to be drawn between a cheque issued as security and a cheque issued towards discharge of a liability to pay notwithstanding that the money is by way of security for due performance of the contract. A cheque given as security is not to be encashed in presenti. It becomes enforceable if an obligation is future is not enforced. It is not tendered in discharge of a liability which has accrued.

32. Thus where a cheque forms part of a consideration under a contract it is paid towards a liability.

33. Section 2(d) of the Indian Contract Act, 1972 defines

consideration as under :-

> “When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

34. Jural concept of consideration is as :-

> “A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.”

35. The jural concept of the consideration requires that something of value must be given, and that this can either be a benefit to the promisor or some detriment to the promisee. In the decisions reported as *Chidambara Iyer v Renga Iyer* AIR 1966 SC 193 and *Sonia Bhatia v State of U.P.* AIR 1981 SC 1271, the Supreme Court compared the jural concept of the consideration and Section 2(d) of the Contract Act and held the two as being practically the same. It was held that the word 'valuable' in civil law could be negative or positive.

36. Thus, “consideration” is a very wide term and is not restricted to monetary benefit. Consideration does not necessarily means money in return of money or money in lieu of goods or service. Any benefit or detriment of some value can be a consideration.

37. In the instant case, the complainant and the other owner

of the said property blocked their asset (property) till the period of completion of construction as provided in the agreement. The promise/act of the complainant and other owner of the said property of blocking their asset for a considerable period can very well be held to be a consideration within the meaning of Section 2(d) of the Indian Contract Act. Thus all reciprocal obligations of the builder would also be a consideration for the contract.

38. In the decision reported as *M/s. Narayana Menon Vs. State of Kerala* AIR 2006 SC 3366 relied upon by the counsel for the petitioners, the Supreme Court was considering the nature and extent of statutory presumption provided under Section 118(a) and 139 of the N.I. Act. The observations relied upon the counsel reads as under :-

> "57. We in the facts and circumstances of this case need not go into the question as to whether even if the prosecution fails to prove that a large portion of the amount claimed to be part of debt was not owing and due to the complainant by the accused and only because he has issued a cheque for a higher amount, he would be convicted if it is held that existence of debt in respect of large part of the said amount has not been proved. The Appellant clearly said that nothing is due and the cheque was issued by way of security. The said defence has been accepted as probable. If the defence is acceptable as probable the cheque therfor cannot be held to have been issued on discharge of the debt as, for example, if a cheque is issued for security or any other purpose the same would not come within the purview of Section

138 of the Act.” (Emphasis supplied)

39. The afore-noted observations are emphasised are clarificatory in nature.

40. In view of above discussion, no ground for quashing the complaint or the summoning order dated 23.9.2002 is made out.

41. No Costs.

November 2, 2007 PRADEEP NANDRAJOG

SL JUDGE